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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 79

HARRY C. MOORE, as Treasurer of Grant County, Indiana, - - - - - - Petitioner,

vs.

SIDNEY Z. MITCHELL and NIEL A. WEATHERS (sued as NEIL A. WEATHERS), as Executors of the Last Will and Testament of RICHARD EDWARDS BREED, Deceased, - - Respondents.

BRIEF FOR PETITIONER

On Writ of Certiorari to The United States Circuit Court of Appeals for the Second Circuit.

RUSSELL H. ROBBINS,
Counsel for Petitioner.

HENRY M. DOWLING,
Of Counsel.

34,188

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INDEX.

PAGE

Statement 8

ARGUMENT

Point I. The underlying question..... 10

Point II. Transitory causes of action of a civil nature are enforcible in the courts of another jurisdiction, unless under the public policy of such jurisdiction there is a sufficient reason to refuse such enforcement 10

Point III. The exception, that criminal and penal liabilities will not be enforced in another jurisdiction, should not be extended to include civil liabilities arising under revenue laws..... 11

Point IV. Refusal to enforce revenue laws extraterritorially has its origin in conditions of commercial rivalry between nations. The reasons underlying such refusal are wholly inapplicable as between the nation and its constituent states 23

Point V. Personal property taxes, under the laws of Indiana, were due and became the personal obligations of taxpayers in each year, whether or not the amount thereof had been fixed by assessment. The obligations here sued upon became the personal obligation of the decedent in each year of his residence in Grant County, and were his personal obligations at the time of his death. No assessment was necessary to the liability..... 25

PAGE

Point VI. The conception of tax liability entertained by the federal courts differs fundamentally from the conception generally entertained by the courts of the states. Under the former, at least, no principle of law prevents suit in a jurisdiction extraneous to the taxing jurisdiction 37

Point VII. Extraterritorial imposition of tax liability must be distinguished from extraterritorial enforcement of such liability. The latter is constitutionally unobjectionable 47

Point VIII. The cases cited in the prevailing opinion of the Circuit Court of Appeals are all distinguishable or are mere decisions of courts of minor jurisdiction. 54

Conclusion 76

TABLE OF CASES CITED.

	PAGE
Ashley *v.* Ryan, 153 U. S. 436 (distinguished)	58
Attorney General for Canada *v.* William Schulze and Co., 9 Scots Law Times (1901-1902) 4 (distinguished)	16
Ballou *v.* United States, etc., Co., 67 N. J. Eq. 188, 59 Atl. 331 (distinguished)	57
Barnum *v.* Rallihan, 63 Ind. App. 349, 112 N. E. 561, 565.	27
Bear River Co. *v.* Petoskey, 241 Fed. 53	75
Beard, Treas., *v.* Allen, 141 Ind. 243, 248	28
Bell *v.* Hines, 16 Ind. App. 181, 44 N. E. 576, 577	27
Bernardino Co. *v.* Southern Pac. R. Co., 118 U. S. 417	75
Billings *v.* United States, 232 U. S. 261	39-44
Blodgett *v.* Silberman, 277 U. S. 1	13, 65, 70
Boston and Maine R. R. Co. *v.* Hurd, 108 Fed. 116	17
Bogue *v.* Laughlin, 149 Wis. 271, 282, 136 N. W. 606	29
Bristol v. Washington County, 177 U. S. 133	22
Buck *v.* Miller, 147 Ind. 586, 598	30
City of New York *v.* McLean, 170 N. Y. 374 (distinguished)	73
Columbia Law Review, Vol. 29, p. 782	23-24
Coy *v.* Title Guaranty Co., 220 Fed. 93	75
Darnell *v.* State, 174 Ind. 143, 90 N. E. 769 (affirmed in 226 U. S. 390)	25-38
Dayton, Trustee, *v.* Stanard, Treas., 241 U. S. 588	75
Dennick *v.* Central R. R. Co., 103 U. S. 11, 17	46
Dewey *v.* Des Moines, 173 U. S. 193 (distinguished)	73
Dollar Savings Bank *v.* United States, 19 Wall. 227, 237.	44
DuBois *v.* Board, 4 Ind. App. 138, 30 N. E. 206	29
Dumont *v.* United States, 98 U. S. 142, 144	33
Fourth National Bank *v.* Francklyn, 120 U. S. 747, 751	46
In re Franklin, 26 Misc. 107, 56 N. Y. S. 858	29
Franklin Trust Co. *v.* New Jersey, 181 Fed. 769, 104 C. C. A. 629 (distinguished)	56
First Natl. Bank *v.* Ewing, 103 Fed. 168	75
Funk *v.* State, 166 Ind. 455, 457	25-38
Galveston, etc., Ry. Co. *v.* Wallace, 223 U. S. 481	53
Georgia *v.* Atl. R. R. Co., 3 Woods 434	75
Goodrich *v.* Rochester Trust Co., 173 App. Div. (N. Y.) 577	74
Gormley *v.* Bunyan, 138 U. S. 623, 635	46
Graham *v.* Russell, Auditor, 152 Ind. 186, 189	30

PAGE
Gulledge Bros. Lumber Co. *v.* Wenatchee Land Co., 122 Minn. 266 (distinguished) 15
Hamilton *v.* Schlitz Brewing Co., 100 Fed. 675..... 21
Hardin *v.* Kelley, 144 Fed. 353, 75 C. C. A. 355..... 27
Heine *v.* The Levee Commissioners, 86 U. S. (19 Wall.) 655 74
Henderson *v.* Whitinger, Adm., 56 Ind. 131, 132..... 32
Henry *v.* Sargent, 13 N. H. 321, 332.....24-74
Holshouser Co. *v.* Copper Co., 138 N. C. 248, 50 S. E. 650 (distinguished) 57-74
Howarth *v.* Lombard, 175 Mass. 570, 572, 56 N. E. 888.. 52
Huntington *v.* Attrill, 146 U. S. 657, 672..... 21
Hubble *v.* Berry, 180 Ind. 513, 103 N. E. 328, 330..... 27
Ladoux *v.* Labee, 83 Fed. 761..... 75
Litchfield *v.* County of Webster, 101 U. S. 773..... 75
Loucks *v.* Standard Oil Co., 224 N. Y. 99.....51-62
Malloy *v.* American Hide and Leather Co., 148 Fed. 482. 17
Marshall *v.* New York, 254 U. S. 380..... 75
Marshall *v.* Sherman, 148 N. Y. 9 (distinguished)..... 73
Martyne *v.* American Union Fire Ins. Co., 216 N. Y. 183, 194 62
Matter of Anita Bliss, 121 Misc. (N. Y.) 773 (distinguished) 59
Matter of Maltbie *v.* Lobsitz Mills Co., 223 N. Y. 227 (distinguished) 73
Maxwell *v.* Bugbee, 250 U. S. 525 (distinguished)..... 73
Meredith *v.* United States, 13 Peters 486, 493, 494.33-34-40
Midland Co. *v.* Douglas County, 217 Fed. 358..... 75
Mullikin *v.* Reeves, 71 Ind. 281, 284.....25-38
Mills *v.* Green, 159 U. S. 651, 657..... 46
Moore, Treas., *v.* Mitchell, 28 Fed. (ed.) 997..... 7
Moore, Treas., *v.* Mitchell, 30 Fed. (2d) 600..... 7
Municipal Council of Sydney *v.* Bull, (1909) 1 K. B. 7 (distinguished) 15
New York Trust Company *v.* Island Oil and Transport Corporation, 11 Fed. (2d) 698 (distinguished)..... 55
Owings *v.* Hull, 9 Peters 607..... 46
Parker *v.* Moore, 115 Fed. 799 (distinguished)..... 72
Pennoyer *v.* Neff, 95 U. S. 714 (distinguished)..... 71
People *v.* Kellogg, 268 Ill. 489 (distinguished)..... 59
Perkins *v.* Boston Co., 90 Fed. 321..... 21
Pratt *v.* Dean, 246 Mass. 300..... 74
Prudential Casualty Co. *v.* State, 194 Ind. 542, 143 N. E. 631 25-38

PAGE
In re Ransford, 194 Fed. 658, 115 C. C. A. 560..... 27
Rees *v.* City of Watertown, 86 U. S. (19 Wall.) 107..... 74
Reynolds, Auditor, *v.* Bowen, Adm., 138 Ind. 434, 447.. 34
Saint, Treas., *v.* Welsh, Exr., 141 Ind. 382, 388..... 34
Southern Ry. Co. *v.* State, 165 Ind. 613, 75 N. E. 273.... 21
State of Arkansas *v.* Bowen, 20 D. of C. Rep. 291..... 74
Spencer *v.* Babylon R. Co., 233 Fed. 803..... 75
State of Colorado *v.* Harbeck, 189 App. Div. 865.....61-70
State of Colorado *v.* Harbeck, 232 N. Y. 71 (distinguished) 59
State of Indiana *v.* Alleghany Oil Co., 85 Fed. 870..... 21
State of Iowa *v.* Slimmer, 248 U. S. 115 (distinguished). 58
State of Maryland *v.* Turner, 75 Misc. (N. Y.) 9..... 74
Stichtenoth *v.* Central Exchange, 99 Fed. 1..... 21
Stockwell *v.* United States, 13 Wall. 531, 546..... 33
Sturges *v.* Carter, 114 U. S. 511, 518..... 35
In re Stutsman County, 88 Fed. 337..... 22
Supervisors *v.* Rogers, 7 Wall. 175, 180..... 22
Tennessee *v.* Whitworth, 117 U. S. 129..... 22
In re Thermiodyne Radio Corp., 26 Fed. (2d) 716..... 23
In re Tyler, 149 U. S. 164..... 75
Union Trust Co. *v.* Great Eastern Co., 248 Fed. 46..... 75
In re United Five and Ten Cent Store, Inc., 242 Fed. 1005 23
United States *v.* Chamberlin, 219 U. S. 250.....42-44
United States *v.* Cobb, 11 Fed. 76, 79.....33-44
United States *v.* Erie Ry., 106 U. S. 327..... 44
United States *v.* Grand Rapids Ry. Co., 239 Fed. 153... 44
United States *v.* Hathaway, 3 Mason 324, 325..... 44
United States *v.* Mexican R. Co., 154 Fed. 519..... 44
United States *v.* Minn. Threshing Machine Co., 229 Fed. 1019, 1020 44
United States *v.* Nashville Ry., 249 Fed. 678, 683-684... 44
United States *v.* National Fibre Board Co., 133 Fed. 597 44
United States *v.* Pacific R. R., 4 Dillon 66, 67-69..... 44
United States *v.* Phelps, 17 Blatch. 312, 315..... 44
United States *v.* Sherman Co., 237 U. S. 146, 153..... 33
Vidal *v.* South American Co., 276 Fed. 855, 870..... 27
Walker *v.* Treasurer, 221 Mass. 600 (distinguished).... 59
Welch *v.* Treasurer, 123 Mass. 87..... 74
Wisconsin *v.* Pelican Insurance Co., 127 U. S. 265 (distinguished) 17-54
Wright *v.* House, 188 Ind. 247, 256, 121 N. E. 433, 436... 25

STATUTES CITED.

	PAGE
Burns Indiana Statutes, 1926 Revision.	
Section 3155	32
Section 3156	32
Section 3229	26-30
Section 14048	26
Section 14052	26
Section 14100	29
Section 14194	26
Section 14204	26
Section 14246	26
Section 14217	29
Section 14288	26
Section 14299	26
Section 14349	26
Section 14383	26
Section 14387	26
Indiana Session Laws 1927, Chapter 54, pp. 141-142	26

34,188

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vs.

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BRIEF FOR PETITIONER

On Writ of Certiorari to The United States Circuit Court of Appeals for the Second Circuit.

OFFICIAL REPORTS OF DECISIONS IN COURTS BELOW.

HARRY C. MOORE, as Treasurer of Grant County, Indiana, v. SIDNEY Z. MITCHELL, et al. (District Court) - - - 28 Fed. (2d) 997

HARRY C. MOORE, as Treasurer of Grant County, Indiana, v. SIDNEY Z. MITCHELL et al. (Circuit Court of Appeals) - 30 Fed. (2d) 600

STATEMENT.

During each of the years from 1888 to 1926, both inclusive, Richard Edwards Breed was a citizen, resident and inhabitant of Grant County, Indiana. (Tr., fol. 6.) Breed died testate in 1926. Administration was had on his estate in the State of New York and defendants are engaged in administering said estate as executors thereof. No distribution of the estate has yet been made. (Tr., fols. 6, 7.)

During Breed's lifetime and at the time of his death, he was the owner of large amounts of intangible personal property consisting particularly of large amounts of stocks of various business corporations foreign to Indiana, all of which property was taxable to him as the owner thereof in Grant County, Indiana. Under the statutes of Indiana, it was Breed's duty to return all his personal property for taxation on March first of each year (Tr. fols. 7, 8.) Breed made no such returns but on the contrary failed to disclose and concealed his taxable property (Tr. fol. 10). Under the Indiana statutes a personal liability accrued annually against him on March first of each year, although it remained unliquidated until after his death. Neither Breed nor the present respondents have paid any taxes on the property in question (Tr., fol. 11).

Prior to Breed's death, it was unknown to the taxing officials of Grant County that he was the owner of intangible personal property liable to taxation (Tr., fol. 11). After his death, the Auditor of Grant County received information that large amounts of intangible personalty owned by Breed had been omitted in the assessment of each of the years 1903 to 1926, both inclusive, and after a hearing, fixed and assessed the fair and proper taxable value of said omitted property for each of said years and

upon such taxable values assessed taxes for the said years for county, city, civil, township and school township purposes in said Grant County and its political subdivisions, and exclusive of all taxes due the State of Indiana, aggregating $982,516.22 (Tr., fols. 12-15). None of these taxes have been paid (Tr., fol. 20).

Respondents were notified of said auditor's hearing (Tr. fol. 13); they were also notified of his official assessment, as required by the Indiana statute (Tr. fols. 17, 18). They have not, however, taken advantage of the right of appeal given by that statute, nor have they taken any steps to question the assessment (Tr. fol. 18).

The present action was brought in the United States District Court for the Southern District of New York to recover the amount of the said taxes from the said executors.

The petitioner, as Treasurer of Grant County, Indiana, is by statute specifically authorized to maintain the present action (Tr., fols. 18-20).

This case was heard in the District Court upon the complaint and notice of motion for judgment (Tr. fols. 1, 2).

The motion was granted and the action dismissed upon the ground of lack of jurisdiction.

Upon appeal to the United States Circuit Court of Appeals for the Second Circuit, this final disposition of the action was affirmed.

Thereafter certiorari was granted by this court.

ARGUMENT.

Point I.

The Underlying Question.

The underlying question is whether a court of the United States will entertain jurisdiction to enforce liability for taxes accrued to a municipal corporation extraneous to the territorial jurisdiction of such court. The particular form in which this question is presented is whether a federal court will so entertain jurisdiction where the taxes involved are personal property taxes, accrued to a municipal corporation from a resident thereof during the time of such residence and constituting a personal liability of such resident.

Point II.

Transitory causes of action of a civil nature are enforcible in the courts of another jurisdiction, unless under the public policy of such jurisdiction there is a sufficient reason to refuse such enforcement.

The courts of one jurisdiction will not enforce the criminal or penal laws of another jurisdiction. Causes of action arising under such laws are, however, inherently neither transitory nor civil.

The general rule of enforcibility of transitory, civil causes of action is so thoroughly established that no endeavor will be made in this brief to support it, but the argument of the brief will be directed to the point that causes of action arising under revenue laws should constitute no exception.

Point III.

The exception, that criminal and penal liabilities will not be enforced in another jurisdiction, should not be extended to include civil liabilities arising under revenue laws.

As the reasons asserted for so extending the exception are thoroughly discussed in the two opinions in the Circuit Court of Appeals (Tr., fols. 35-46) these opinions will first be examined.

(a)

The Prevailing Opinion.

The prevailing opinion held (Tr., fol. 37):

> "With the appellees and the property without the state, and the estate being administered in New York, the effort to collect a tax, for a political subdivision of Indiana, is repugnant to the settled principles of private international law, which preclude one state from acting as a collector of taxes for a sister state, and from enforcing its penal or revenue laws as such. The revenue laws of one state have no force in another. The taxing power of a state is, by the Federal Constitution (Amendment 14), limited to persons and property within its jurisdiction."

And further (Tr., fol. 38):

> "The tax laws of one state cannot be given extraterritorial effect, so as to make collections through the agency of the courts of another state. Indiana's political subdivision, Grant County, is limited in the payment of taxes of property found within its boundaries."

The principal criticism of the prevailing opinion is that it advances no reason for extending the exception to causes of action arising under revenue laws, but reaches its conclusion by the indiscriminate application of decisions in penalty cases to the instant case, making no distinction between penal cases and revenue cases.

The prevailing opinion also cites as applicable, cases which do not deal with extraterritorial *collection of taxes already accrued,* but which hold only that state statutes do not run extraterritorially so as to *impose,* outside the state border, *original liability.*

The cases cited in the prevailing opinion are discussed under Point VIII hereof.

There is an undoubted principle of private international law which precludes one state from enforcing the penal or revenue laws of another state *as such.* This means, merely, that one state cannot impose original liability under the laws of another state. But exhaustive research by counsel for the petitioner has failed to discover any case in which either this court or the lower federal courts have held that obligations arising under the revenue laws of any state may not be collected in a federal court, or any case in which the appellate court of a state has held that, constitutional and statutory requirements being fulfilled, obligations arising under the revenue laws of one state may not be collected in the courts of a sister state. Decisions in the state courts on this question are at least meager and the question is unsettled in at least almost all of the states. In any case each sovereignty determines the jurisdiction of its own courts and federal courts are not bound by the policy of the several states nor the decisions of the state courts, such decisions being of force in the federal courts only insofar as their reasoning may be persuasive. Moreover the relationship existing between the nation and the

several states thereof is so radically different from the relationship existing between the several states of the nation that reasons which might actuate a state in denying the use of its courts to another state, or to the municipal subdivisions thereof, would be wholly absent when relief was sought in the courts of the nation.

The prevailing opinion is based in part upon the fact that the property was not shown to have been physically in Indiana at any time. The property consisted of shares of stock belonging to a resident of the State of Indiana at the time the liability accrued. It had a taxable situs in Indiana.

Blodgett v. *Silberman*, 277 U. S. 1.

The prevailing opinion also makes the point that the tax was not assessed until after Breed's death. It is stated (Tr., fol. 39):

> "The appellant attempted to impose a tax prior to the commencement of the action. The taxing authorities went through the forms prescribed by the statutes of Indiana, but Breed was dead before the assessment and the attempt was fruitless. The property was not physically there. Under the due process clause of the United States Constitution, Indiana had no jurisdiction to impose a tax because neither the property or the deceased was within its jurisdiction at the time the tax was assessed."

The tax liability, here sought to be enforced, accrued during the several years of Breed's residence in Indiana, and not upon assessment. This is discussed under Point V hereof.

It is irrelevant whether or not the property was physically present in Indiana at any time or whether the

respondents were ever in Indiana or whether the tax was assessed before or after the death of Breed. The important facts are that Breed during the various years in which tax liability accrued was a resident of Indiana and was the owner of the securities in question. Such residence and ownership gave jurisdiction for taxation.

(b)

Concurring opinion of Judge Learned Hand.

Judge Hand recognizes the distinction between criminal and penal cases and revenue cases, and states that, so far as he can find, no federal court has ever passed on the point as to whether in revenue cases an exception is to be made to the rule that a liability arising under the law of a foreign state will be recognized by the courts of another. Judge Hand said (Tr., fol. 44):

> "Generally it is, of course, true that a liability arising under the law of a foreign state will be recognized by the courts of another, and it is not here relevant whether foreign liability is enforced, or another, precisely similar, raised by the law of the forum. A recognized exception is in the case of criminal and penal liabilities. * * * In some few cases this exception has been extended to include revenue laws as well. * * * But so far as I can find the point has never been passed on by a federal court."

The petitioner is in entire agreement with the reasoning of Judge Hand, except that he dissents from the final conclusion, that the exception above referred to should be extended to include obligations arising under revenue laws.

Judge Hand, deciding this question as one of first impression in the federal courts, states that in some few cases, in other courts, the exception has been extended to include revenue laws (Tr., fol. 44). He cites four cases as instances.

The petitioner believes that the case of *Colorado* v. *Harbeck*, 232 N. Y. 71, cannot properly be so construed. A full discussion of this case is contained in Point VIII of this brief, at p. 59. In the *Harbeck* case revenue acts were classified with criminal and penal laws. The decision assumed the classification and made no endeavor to support it by reason. The case was decided on a point of constitutional law and advances no reason for refusing to entertain jurisdiction of suits for tax obligations arising in another state if such jurisdiction may constitutionally be assumed.

The petitioner agrees that in the case of *Municipal Council of Sydney* v. *Bull*, (1909) 1 K. B. 7, the court was of the opinion that action could not be brought in one country to enforce the revenue laws of another country, but calls attention to the fact that the exact decision was that it was not the intent of the Australian statute, which authorized collection by suit, to authorize suit beyond the confines of the Colony, coupled with the fact that the action in question was a mixed action and, therefore, not transitory in nature.

The case of *Gulledge Bros. Lumber Co.* v. *Wenatchee Land Co.*, 122 Minn. 266, decided that the provision of a Washington statute, to the effect that no corporation should be permitted to commence or maintain any suit in any court of that state without alleging and proving that it had paid its annual license fee last due, was not operative outside the State of Washington to prevent the maintenance of suit. The statute in question had been construed by the Supreme Court of Washington as a revenue act but the Minnesota court treated the provision referred

to as a penal provision and so explicitly characterized it. Penal provisions of revenue acts are no more enforcible outside the state than are any other penal provisions. As the point Judge Hand was making was the distinction between revenue acts and penal acts, the *Gulledge Bros.* case does not serve as an illustration merely because the penal provision was found in a revenue act.

The case of *Attorney General for Canada* v. *William Schulze & Co.*, 9 Scots Law Times (1901-1902) 4, was a suit for the collection in Scotland of court costs incurred in Canada in the unsuccessful defense of an action to forfeit certain merchandise for an alleged infraction of the Canadian revenue laws. The suit in which the costs were incurred was highly penal. The basis of the decision in the Scotch court was that the imposition of costs constitutes an additional punishment, and also that the expenses of an action are always regarded as a mere accessory or incident of the principal claim.

Therefore, with the possible exclusion of the *Municipal Council of Sydney* case, none of the cases cited by Judge Hand are illustrations of the alleged exception.

Dicta are found in various cases to the effect that revenue acts are subject to the same exception as criminal and penal laws, but the research of counsel for the petitioner has failed to discover any cases, at least in appellate courts, in which the point was actually decided and applied.

Between penalties, which are inherently punitive, and analogous to the sanctions of criminal law, as to which the enacting state exercises sole jurisdiction, and the present civil cause of action, there is absolutely no analogy, either under authoritative precedent or in reason.

Penalties and punishments are inflicted to preserve the domestic order of the state and to prevent a repetition

of the offense within the enacting state, and hence are intended to have only a local application and enforcement. This can best be accomplished by meting out punishment in that state only, and not in some remote territory. "The proper place for punishment is where the crime is committed."

> *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 291.

The enforcement of criminal or penal sanctions is peculiarly a matter of local jurisdiction. The punishment of crime or the imposition of a penalty is determined by the degree of criminality or culpability. The question of the extent of a fine or other punishment is properly governed by local considerations and is a matter of judicial discretion. The duty of exercising such discretion is one which a foreign court could not well perform. Further, a penalty is subject to the control of the executive of the state by which the proceeding was authorized and it may be, at any time either before or after judgment, annulled by a pardon. A pardon, however, could not affect a judgment rendered in another jurisdiction.

> *Boston & M. R. R. Co.* v. *Hurd*, 108 Fed. 116; *Malloy* v. *American Hide & Leather Co.*, 148 Fed. 482.

Judge Hand points out the objections to passing on provisions for the domestic order of another state, and bases his conclusion on the premise that revenue laws fall within the same reasoning. He says (Tr., fols. 44-46).

> "While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which in-

cludes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign state if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are entrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to untertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.

"For these reasons I concur."

Judge Hand's reasoning is wholly inapplicable to revenue laws. Suits for the recovery of obligations accrued under revenue laws are mere suits for money judgments. The only relation between the foreign state (or its subdivisions) and its citizen is that of creditor and debtor. No relationship between the states is involved. The court can only render judgment for the

amount of the tax obligation or refuse to render such judgment. An adverse judgment can be no more detrimental to the interests of the foreign state than a refusal to entertain the suit, and the only serious embarrassment a neighboring state could suffer would be its inability to collect its revenues. Although revenue laws affect a state and its municipalities in matters as vital to their existence as criminal laws, the only vital concern is that the revenues be collected, and to refuse to entertain jurisdiction is to refuse relief in a matter which Judge Hand states is vital to the state's existence. Certainly, therefore, the vitality of the foreign state's concern is no reason for refusing relief.

Judge Hand reasons that the domestic state reserves the right to scrutinize the liability imposed by criminal and penal laws of a foreign state, because of the possibility that such liability might not accord with the policy of the domestic state. But no such clash with domestic policy could, under any circumstances, arise as to a property-tax liability *in personam* created by the foreign state; for the public policy of every state is, that taxes on property should be paid to the public corporations imposing them. Tax paying, not tax evasion, is consonant with public policy everywhere. The reference of the court in *United States* v. *Nashville, C. & St. L. Ry.*, 249 Fed. 678, 682, to "the general policy of the law to promote, rather than to obstruct, the collection of public revenue," is applicable to state as well as federal revenue.

There is, as a practical matter, no opportunity for differences of opinion between the federal court and a taxing state as to the public policy of a revenue measure. There is far greater similarity among state and federal revenue laws than among penal statutes of different states. Constitutional limitations on the taxing power of the states have been defined by the United States Su-

preme Court. There is no difference in policy between the Federal Government (or the several states) and any particular state in their tax programs, but all are in harmony on the propriety and necessity of property taxation. Details of the laws differ, but the broad principles of *ad valorem* taxation are the same. Not so as to penal statutes. These may embrace anything the legislature deems within the police power, requiring protection for its citizens in their health, morals, safety, or "general welfare," as determined by local needs, customs, education, morality, business or natural conditions.

The position of the State of Indiana with respect to the rights of Grant County in the pending controversy has been made clear by that state itself. The statutes pronounce that personal property taxes shall become personal obligations of residents in each year. Assessment has been made in the manner provided by statute. This action has been instituted under a statute specifically authorizing such suits, by an official therein specifically designated for that purpose. The only question involved is whether the money claimed in the complaint is due to Grant County, Indiana, and the municipal subdivisions thereof.

The inquiry necessary to determine whether comity will be extended, therefore, concerns no delicate questions between Indiana and its citizens or between Indiana and any other state, nor any policy of the State of Indiana, except a policy to which it has plainly and unquestionably committed itself. It is necessary for the federal court only to determine whether the Indiana laws in question agree with its own notions of what is proper. These laws are ordinary personal property tax laws. There can be no question as to their propriety.

The arguments advanced by Judge Hand are based on

the difference of jurisdiction only and not on any territorial consideration, and apply with full force to the enforcement by federal courts of criminal and penal laws of the state within which the court sits. Consistently therewith, a federal court will not enforce a penal law *even of the state in which the federal court sits.*

> *State of Indiana* v. *Alleghany Oil Co.,* 85 Fed. 870;
> *Perkins* v. *Boston Co.,* 90 Fed. 321;
> *Stichtenoth* v. *Central Exchange,* 99 Fed. 1;
> *Hamilton* v. *Schlitz Brewing Co.,* 100 Fed. 675.

The reason for non-enforcement is, that the federal and state sovereignties are distinct and independent. Offenses against one are not necessarily offenses against the other. Therefore the federal sovereignty sitting in New York will not punish infractions of the penal laws of the state sovereignty of New York, nor of any other state.

> *Huntington* v. *Attrill,* 146 U. S. 657, 672;
> *Southern Ry. Co.* v. *State,* 165 Ind. 613, 75 N. E. 272, 273.

As was held in *State of Indiana* v. *Alleghany Oil Co.,* 85 Fed. 870, 873:

> "The penal laws of the several states of the United States are regarded, so far as the jurisdiction of the United States is concerned, as laws of a foreign country."

If revenue laws fell within the reasoning applicable to criminal and penal laws, federal courts should refuse to recognize or enforce the revenue laws even of the state in which they sit. But, on the contrary, federal courts enforce such laws. Since, then, territorial considerations

are not the determining factor in the refusal of federal courts to enforce the criminal and penal laws of states, the territorial factor should not be interjected into the consideration of whether federal courts will enforce obligations arising under the revenue laws of states. Since the federal courts enforce revenue laws of the states in which they sit, it follows that they should equally enforce revenue laws of other states.

Federal courts take jurisdiction of suits brought for the specific purpose of compelling local tax officials to take steps to collect local taxes.

Tennessee v. *Whitworth,* 117 U. S. 129.

Thus, the right to issue a writ of mandamus has long been recognized as possessed by federal courts, to force state or municipal taxing officers to perform their duty in levying or collecting local taxes, or to cause them to be collected.

Supervisors v. *Rogers,* 7 Wall. 175, 180.

The federal court may assume jurisdiction over a case on removal which involves enforcement of local taxation against the removing party.

In re Stutsman County, 88 Fed. 337;
Bristol v. *Washington County,* 177 U. S. 133.

The above conclusion is strengthened by the policy of the Federal Government in opening its courts to states or their subdivisions for the collection of their tax claims in bankruptcy proceedings. Section 64a of the bankruptcy act directs the trustee to pay "all taxes legally due and owing by the bankrupt to the United States, *state, county, district or municipality,* in advance of the payment of dividends to creditors, and in case any question arises as

to the amount or legality of any such tax, the same shall be heard and determined by the court." (Italics ours.)

Under this section, state taxes have been allowed and paid in districts located outside the taxing state; the federal courts refusing to confine the statute to local taxes only.

In re United Five and Ten Cent Store, Inc., 242 Fed. 1005 (District Court, S. D. N. Y.);

In re Thermiodyne Radio Corp., 26 F. (2d) 716 (tax claim of New York allowed in District of Delaware).

This practice of the national courts indicates that tax liability, whether regarded technically as a debt or not, is such a claim or demand in the hands of states and their subdivisions, that it will be enforced in any federal court having jurisdiction of the bankruptcy proceedings. Such an attitude is wholly inconsistent with the theory that federal courts do not aid in the collection of taxes assessed outside their districts.

Point IV.

Refusal to enforce revenue laws extraterritorially has its origin in conditions of commercial rivalry between nations. The reasons underlying such refusal are wholly inapplicable as between the nation and its constituent states.

The history of refusal to enforce revenue laws extraterritorially is dealt with in a most enlightening note in the June, 1929, issue of the Columbia Law Review, in which the decision of the Circuit Court of Appeals in the present litigation is discussed.

Columbia Law Review, Volume XXIX, No. 6, page 782.

In certain English cases the doctrine was developed that the courts of England would not enforce the revenue laws of a foreign country. These cases were based on commercial expediency. The basis of the doctrine was harm to British commerce. The doctrine was first announced in this country in a dictum in

Henry v. *Sargeant,* 13 N. H. 321, 332, (1843),

a case of false imprisonment, no enforcement of a revenue law being involved. Since then various dicta have appeared, to the effect that the courts of one state would not enforce the revenue laws of another state, but, as said in the Columbia Law Review note above referred to (p. 791):

> "No case in an appellate court in the United States has squarely decided that one state will not enforce the revenue laws of another if all constitutional requirements have been met."

The English cases above referred to were cases of international law, as distinguished from interstate law. The reason for such refusal manifestly has no application as between the United States and the several states thereof. Even were there sufficient reason to apply the rule as between the several states of the Union, as for instance, a desire to keep the property of the tax-debtor within the state's territory for the benefit of its own citizens, no such reason obtains as between the nation and the states. The policy of the nation toward the states is one of co-operation and not of rivalry. The said note in the Columbia Law Review reaches the following conclusion (p. 787):

> "Without the existence of these reasons of policy there seems to remain no valid justification for not permitting a suit in one state on a tax lawfully

levied by another. The simplest ideas of comity would compel such result."

Point V.

Personal property taxes, under the laws of Indiana, were due and became the personal obligation of taxpayers in each year, whether or not the amount thereof had been fixed by assessment. The obligations here sued upon became the personal obligation of the decedent in each year of his residence in Grant County, and were his personal obligation at the time of his death. No assessment was necessary to fix the liability.

Under Indiana law, general property taxes are a *personal* liability of the owner. As held in *Prudential Casualty Co.* v. *State,* 194 Ind. 542, 143 N. E. 631:

> "We think that it should be regarded as settled in this state that general taxes constitute a personal liability against the owner of the property upon which the assessment is based. Taxes, as distinguished from assessments for local improvements, are imposed on the person, rather than on the property which is resorted to merely for the purpose of ascertaining the amount. The weight of authority is that where taxes are viewed as creating a personal liability, the state" (here, the county) "is not restricted to the methods of collection prescribed by statute, but may maintain an action at law therefor."

Mullikin v. *Reeves,* 71 Ind. 281, 284;
Funk v. *State,* 166 Ind. 455, 457;
Darnell v. *State,* 174 Ind. 143, 90 N. E. 769 (affirmed in 226 U. S. 390);
Wright v. *House,* 188 Ind. 247, 256, 121 N. E. 433, 436.

The statutes of Indiana effectively stamp the tax liability as a personal obligation, and they leave no doubt that it is not merely a liability *in rem*.

> Burns' Stats. 1926, Sects. 3229, 14246, 14204, 14194, 14048, 14052, 14349, 14387, 14299, Acts 1927, p. 142.

A lien upon all property as security for the current year's taxes attached on March first of each year. The statutes read:

> "*All the property,* both real and personal, situated in any county, *shall be liable for the payment of all taxes, penalties, interest and costs, charged to the owner thereof* in such county, and no partial payment of such taxes, penalties, interest or costs shall discharge or release any part or portion of such property until the whole is paid; *which lien* shall in nowise be affected or destroyed by any sale or transfer of any such personal property, *and shall attach on the first day of March, annually, for the taxes of such year.*" (Italics ours.)
>
> Burns' Stats. 1926, Sect. 14288.

> "The lien of the state for all taxes for State, County, School, road, township and all other purposes, and all taxes for city, town or municipal purposes, shall attach on all real estate on the first day of March annually."
>
> Burns' Stats. 1926, Sect. 14383.

The personal obligation arises at the same time that the lien attaches. There can be no lien unless there is a liability which it secures. A lien is necessarily predicated

on an obligation, which must be in effect at the time the lien arises. On this point the opinion of Judge Learned Hand is clearly sound in stating (fol. 43):

> "I think that a personal liability was imposed upon Breed before his death, which was after March 1. That is the date when the tax is imposed and when the lien attaches to any property within the State. It can hardly be that the lien arises before the liability and the assessment may be, and in my judgment should be, considered as no more than a liquidation of a liability already existing. • • • Hence it seems to me that the liability was valid."

The term "lien" connotes "liability," and was obviously used by the legislature with that implication.

> *Vidal* v. *South Amer. Co.*, 276 Fed. 855, 870;
> *In re Ransford*, 194 Fed. 658, 115 C. C. A. 560;
> *Hardin* v. *Kelley*, 144 Fed. 353, 75 C. C. A. 355;
> *Hubble* v. *Berry*, 180 Ind. 513, 103 N. E. 328, 330;
> *Bell* v. *Hines*, 16 Ind. App. 184, 44 N. E. 576, 577.

The Indiana decisions fully support the foregoing conclusions. These hold, without variation, that the lien and the individual obligation arise at the same time, viz., on March 1. Thus, in *Barnum* v. *Rallihan*, 63 Ind. App. 349, 112 N. E. 561, 565, the court said:

> "Where taxes have accrued upon the real estate of a person before his death, *they become a charge against him, as well as a lien upon all his property*, and such taxes should be paid by his executor or administrator out of the personal estate if sufficient for that purpose • • •. By the statute the taxes

> for each year attach and become a lien upon both real and personal property on the 1st day of March annually, though the same are not due and payable until the following year, and will not become delinquent until after the first Monday in May. *While not expressly so stated, our decisions seem to treat all taxes as accruing on the first day of March when the lien thereof attaches to the property assessed.* (Citing Indiana cases.) The taxes which accrued and became a lien upon the testator's undivided one-half of the aforesaid northwest quarter section of real estate on March 1, 1910, prior to his death, were a claim against him, and should have been paid by the executrix out of his personal estate." (Italics ours.)

In *Beard, Treas.*, v. *Allen*, 141 Ind. 243, 248, the court regarded the existence of the lien and the existence of personal liability of the property owner as arising simultaneously. At p. 248 it was said:

> "It appears from the provision of the tax law cited that *this lien is made perpetual for all taxes due from the owner*, and that all property owned by the tax debtor, both real and personal, situated in any county, is made liable for the payment of all taxes *charged to him or her.* * * * The liability thus incurred ceases only with payment." (Italics ours.)

It is obvious that there is a difference, as to the character and extent of personal obligation during the current year, between a resident who owns taxable property on March 1, none of which he returns for taxation, and a resident who acquires taxables after March 1. Both are under a *general* civic duty to pay taxes. But that duty

becomes *definite, specific* and *personal* on March 1 of each year, with respect to the property owned on that date. If no property is then owned, no tax then accrues. The property owner is, by law, made an assessor of his own property as of March 1, annually. (Burns' Stats. 1926, Sect. 14100); his assessment to stand unless altered by the tax officials. (*DuBois* v. *Board,* 4 Ind. App. 138, 30 N. E. 206.) If such owner fails to perform this duty as an assistant of the taxing authorities, but conceals his property and places no value upon it, neither he nor his estate should thereafter be permitted to take advantage of his delinquency by attempting to avoid the personal liability which, if he had performed his duty by disclosure and valuation, would unquestionably have attached on March 1, and which did then attach as to every owner who complied with the law.

After March first the taxes are liabilities of the taxpayer, even before assessment; and after his death they are liabilities of his estate, even though there be no assessment until after his death. *Assessment is not a condition precedent to the liability of the estate to pay such taxes.*

> *Re Franklin,* 26 Misc. 107, 56 N. Y. S. 858;
> *Bogue* v. *Laughlin,* 149 Wis. 271, 282, 136 N. W. 606.

That taxes may accrue before their amount is definitely computed is shown by Burns' Statutes of Indiana, 1926 revision, Section 14217, sixth item, where tax levies prior to 1919 were repealed but with this qualification:

> "Such repeal shall not release or cancel any taxes *accrued* under such levies and such levies shall remain in force for *computation* of taxes on property *omitted from assessments heretofore made.* (Italics ours.)

The statute, authorizing payment of taxes by an executor, reads:

"Unless otherwise provided in this act the *debts and liabilities* of a decedent, shall, if his estate be solvent, be paid in the following order of classes. * * * *Fourth.* Taxes *accrued* upon the real and personal estate of the decedent at his death." (Italics ours.)

Burns' Stats. 1926, Sect. 3229.

In *Buck* v. *Miller, Treas.*, 147 Ind. 586, 598, the county treasurer assessed omitted taxes on personalty in Indiana, owned by Nash, such assessment being made *after his death,* but covering 12 years prior thereto. In sustaining the action of the treasurer, the court said, p. 598:

> "He (Nash) *died owing certain taxes which he had avoided paying for a great many years. Those taxes have now been assessed* in pursuance of statutory provisions for the assessment of omitted property. The taxes are a lien on all property in the county belonging to his estate. This lien can be released only by payment of the taxes. *He could not by giving away his property relieve it of the burden cast upon it by the law.*" (Italics ours.)

In *Graham* v. *Russell, auditor,* 152 Ind. 186, the auditor sought to set aside the final report filed in the estate of Graham, and to reopen the estate. The complaint alleged that decedent died on July 29, 1895, "leaving a liability for taxation due against his estate for state and county purposes to the amount of $3,000 on account of his failure to list and return all of his property for taxation" (p. 189) for which amount it was alleged his estate was still indebted.

There had been no assessment of the omitted property prior to the filing of the final report and discharge of the

executor, nor prior to the filing of the petition to open the estate, the omission not having been discovered until June 1, 1897.

The court held that the taxes had *accrued in the lifetime of the testator* and consituted an existing obligation at the time the estate was closed. The auditor's petition was granted.

The court said, p. 192:

> "Appellee was, at least, interested * * * in seeing that the taxes, which had accrued by reason of the omitted property, should be paid by the estate of the defaulting decedent * * *. The estate in question, it appears, had been finally settled and its assets turned over to appellant, leaving the matter in regard to the taxes now in controversy still virtually pending unsettled *as a liability for which the estate should account* * * *.
>
> "The facts disclose that the decedent had for many years prior to his death failed to list and return for taxation a large amount of his property, and at his death it is charged he was liable for the payment of taxes, on account of his said default, in the sum of $3,000 and over, *which had accrued and were due* for state, county, and township purposes. * * * He, while in life, owed as one of the highest duties to the government, the duty to pay all taxes imposed upon his property liable to taxation. As a compensation for the discharge of this duty, the state afforded him protection to his life, liberty, and the due enjoyment of the property with which he had been blessed, and the discharge of this duty, if the decedent is shown to have omitted it, must rest upon his estate. *With or without knowledge of the existence*

> *of this liability of her decedent, it existed all the same against the property of his estate until paid,* unless barred by some provision of law.
>
> *"With this charge or liability against the estate,* she, immediately after the expiration of the year allowed by law, procured it to be declared by the court as finally settled, and secured her discharge from further administration of her trust. * * * It follows from what we have said that the petition is sufficient." (Italics ours.)

In *Henderson* v. *Whitinger, Adm.*, 56 Ind. 131, 132, the court declared:

> "Where taxes have accrued upon the land of a person before his death, they become a *personal charge* against him *as well as a lien upon the property;* and it seems to us that such taxes should be paid by the executor or administrator, because they are *debts against the estate."* (Italics ours.)

The annual accrual of the personal liability as a present obligation on March 1 is not prevented by the exact amount of taxes not being ascertained (i.e., liquidated) until a later date. Numerous analogies in the law show that the personal obligation may exist prior to the ascertainment of its precise extent. There may be a stockholder's existing statutory liability for undetermined corporate debts; a surety's liability for the principal's unliquidated obligation; undetermined claims filed in bankruptcy; unliquidated demands used as set-off; unmatured obligations chargeable against a decedent's estate under Burns' Stats. 1926, Sects. 3155, 3156. An apt analogy is, the personal obligation for unascertained customs duties owing the Government. All dutiable goods entering the United States, subject the consignee to *personal liability,*

even before the precise amount of duty is determined. As held in *United States* v. *Cobb*, 11 Fed. 76, 79, quoted with approval in *United States* v. *Sherman Co.*, 237 U. S. 146, 153:

> "The summary proceedings which the customs officers are required by law to take against the goods are in the nature of proceedings *in rem.*, but are not the sole remedies of the government for the collection of its duties. * * * The act makes the duties a *personal debt or charge upon the importer, which accrues to the government immediately upon the arrival of the goods at the proper port of entry. They are due although the goods have been smuggled or for any reason have never come to the hands of the customs officers,* or the statutory proceedings have never been instituted, or through accident, mistake or fraud no duties or short duties have been paid; and the importer is not discharged *from his debt* by a delivery to him of the goods without payment." (Italics ours.)

Accord,

Dumont v. *United States*, 98 U. S. 142, 144.

Goods smuggled or never coming into the hands of the customs officers are similar in status to property omitted from the owner's tax lists. In the one case the customs duties, and in the other the taxes, are "accrued" and "due" from the owner forthwith; even before the public officers are aware of the property's existence. The owner's obligation is *debitum in presenti, solvendum in futuro.*

Meredith v. *United States*, 13 Peters, 486, 493, 494;

Stockwell v. *United States*, 13 Wall. 531, 546.

As held in *Meredith* v. *United States, supra:*

> "The question has also been asked, at what time the right of the government to the duties *accrues* in the fiscal sense of the terms. The answer is, *at the time when the goods have arrived at the proper port of entry.*" (Italics ours.)

Similarly it can be asked: "At what time did the right of Grant County to the taxes on Breed's taxable property accrue?" The answer is: "At the time the property should have been disclosed to the taxing authorities; viz., March 1 of each year."

On the taxing date of each year in which a tax return is omitted there arises a vested right to the taxes collectible if the property had then been returned for taxation as required by law. This vested right is possessed by the several subdivisions entitled to receive the taxes. It has been expressly recognized by the Supreme Court of Indiana. In *Reynolds, Auditor,* v. *Bowen, Adm.,* 138 Ind. 434, 447, the court said:

> "If these taxes were unpaid, they belong to the state. They are the state's property, and the right of the state to them never ceased."

In *Saint, Treas.,* v. *Welsh,* 141 Ind. 382, an executor sued to enjoin the county treasurer from collecting taxes against decedent's estate, assessed on omitted property for the years 1885 to 1890, both inclusive. Decedent died in 1890. Assessment was made in 1891 under a statute enacted in that year empowering the county assessor to list and assess "any omitted property * * * which should be assessed." The Tax Act of 1881 had required every taxpayer to list and return for taxation all his personal property owned on April 1 in each year. It was held that the repeal of the act of 1881 by the act of 1891 did not relieve dece-

dent or his estate from the liability which had accrued each year under the former act.

On page 388 the court said:

> "The right of the state to the taxes in question upon the property omitted by the decedent, prior to the act of 1891, *is not created by this last law but arises under that of 1881.* No such conclusion can be placed upon the statute of 1891 as would authorize a court in holding that the legislature, by any of its provisions, intended to affect the primary right of the state to recover these taxes, *accrued to it under the former law,* for the years mentioned. The tax law of 1891 simply granted to the state as a remedy, or in other words, provided certain means as a procedure to enforce *a right which existed in its favor under a former statute,* namely, that of recovering the taxes to which it was entitled by the act of 1881, and which right the law of 1891 did not abrogate. *It impaired no vested rights of the taxpayer,* and the recovery of the taxes involved in the case at bar was a fair subject for the application of retrospective legislation." (Italics ours.)

The above decisions of the Supreme Court of Indiana are sustained by *Sturges* v. *Carter,* 114 U. S. 511, 518, where this Court held:

> "In substance, this contention is that a taxpayer who has been evading the payment of the taxes due from him by making false returns, can shield himself behind the annual settlement made by the auditor with the treasurer in which his returns were assumed to be true, and that the legislature can pass no act by which the falsity of the returns can for a limited period (in this case four years) be exposed, and the payment of the taxes enforced—in

other words, *that the taxpayer has a vested right in the fruits of his false returns. Such a proposition cannot be sustained. Foster* v. *Essex Bank,* 16 Mass. 245.

"In our opinion, no right of the taxpayer was invaded by the act of 1878. *His investments in bonds and stocks were subject to taxation; the taxes upon such investments were due to the state,* and the act of 1878 merely provided a method by which the taxes might be assessed and collected in spite of the annual settlements made by the auditor. *It gave a new remedy to the state for enforcing a right which it had all the time possessed, namely, the right to the taxes upon property liable to taxation.*" (Italics ours.)

Breed's investments in intangibles were subject to taxation in Indiana during his life. Those taxes were due to Grant County and its subdivisions. The act authorizing the auditor to assess omitted property and the Act of 1927, authorizing treasurers to sue for taxes such as are here involved, gave remedies for enforcing a right which Grant County and its subdivisions all the time possessed, viz., the right to the taxes upon property liable to taxation. As against this claim neither Breed nor his estate had any vested right in the fruits of his failure to return his taxable property.

In the instant case, the proceedings by the auditor after Breed's death were not taken for the purpose of creating, *de novo,* a right to the omitted taxes. They were steps for the enforcement of a statutory remedy for the recovery of *already accrued taxes* to which, in every year of omission during Breed's life, the county and its subdivisions had a vested right because of his residence and ownership. That right could not be divested by Breed's death. Being

a personal obligation (already accrued under the statute) it survived. The remedy for its enforcement was recognized by the Act of 1927 under which this suit is brought.

We respectfully submit:

The nature of the tax obligation sued upon is personal rather than *in rem*. Assessment was unnecessary to fix the tax obligation, although necessary to liquidate the amount thereof. The fact that no assessment was made prior to Breed's death, therefore, did not prevent the accrual of the obligation. The obligation accrued on March first of each year against Breed, and subsists as a claim against his estate.

Point VI.

The conception of tax liability entertained by the Federal courts and by the courts of Indiana differs from the conception entertained by certain of the state courts. Under the former conception, at least, no principle of law prevents suit in a jurisdiction extraneous to the taxing jurisdiction.

The *Harbeck* decision, discussed under Point VIII hereof, at p. 59, is based upon a conception of tax liability radically different from the conception of such liability entertained by the federal courts, but which is entertained by the courts of some of the states, to wit: that tax acts impose no obligation that is enforcible except under the express or implied terms of the act providing for the tax; that taxes may not be collected except in accordance with the provisions of the act, and that unless there be some statutory authority in the act no action for collection will lie; that taxes are not debts, and that no interest runs on delinquent taxes unless so expressly provided by the statute.

Under this conception, liability for taxes is a most restricted obligation, which, it is perhaps arguable, it would be

improper for the courts of a foreign jurisdiction to enforce. The Indiana conception of tax liability, as shown *supra*, Point V, p. 25, is not so restricted. The Indiana statutes create general obligations which under the decisions of the Indiana courts are debts.

> *Mullikin* v. *Reeves*, 71 Ind. 281, 284;
> *Funk* v. *State*, 166 Ind. 455, 457;
> *Darnell* v. *State*, 174 Ind. 143, 90 N. E. 769;
> *Prudential Casualty Co.* v. *State*, 194 Ind. 542, 143 N. E. 631.

The courts of a sister state do not necessarily adopt the conception of tax liability held by the courts of the taxing state. But the federal conception of tax liability accords entirely with the Indiana conception and, therefore, in the federal courts Indiana taxes are general obligations, whether or not technically entitled "debts."

Although the *Harbeck* case was decided on a point of constitutional law the decision was unquestionably influenced by the restrictive conception of the nature of tax obligation entertained by the court. Even though there be a principle of private international law which would preclude the New York courts from enforcing such restricted obligations as the New York courts hold taxes to be, no such principle would apply in the federal courts.

Obligations arising under the laws of foreign states will be enforced under the principles of comity unless the public policy of the trial jurisdiction is contrary to such enforcement. Such public policy will depend in large measure upon the conception entertained in that jurisdiction of the nature of the cause of action—in this case the nature of the liability for personal property taxes.

Under the statutes of Indiana, as construed by the Indiana courts, personal property taxes are debts. The courts of the United States hold that, at least where so

intended by the statute, taxes are debts and that taxes may be collected by suit when there is a sum due, either certain or readily reduced to a certainty, which is a personal liability. Such is the liability in the instant case. Even assuming that under the stringent conception of tax liability entertained in the *Harbeck* and similar decisions, comity might be refused in the enforcement of tax liability, the fudamentally different conception of tax liability entertained by the federal courts would dictate a contrary policy.

We find the federal rule illustrated in the case of *Billings* v. *United States,* 232 U. S. 261, where the Government sued for a federal excise tax upon foreign-built yachts. This case authoritatively distinguishes the federal rule from the state rule. The court there said (p. 285):

> "To avoid prolixity we do not review the state cases as to non-liability for interest on default of taxes but content ourselves with stating that we think it is apparent that the conclusion which they sustain, leaving aside minor differences rests upon two fundamental propositions: First, the necessity for an express statute providing for interest except in cases of contract, and second, that even where there is a statute providing for interest on all debts, such statute is not applicable to taxes because they are not debts and therefore must be enforced alone by virtue of express legislative penalties, except where a provision exists giving *eo nomine* interest on taxes. But both of these propositions are in conflict with the settled doctrine established by the decision of this court. Thus, as to the necessity for a statute it was long ago here decided in view of the true conception of interest, that a statute was not necessary to compel its payment where in accord-

ance with the principles of equity and justice in the enforcement of an obligation, interest should be allowed. *Young* v. *Godbe,* 15 Wall. 562, 565:

> " 'It is said there is no law in the Territory of Utah prescribing a rate of interest in transactions like the one in controversy in this suit, and that, therefore, no interest can be recovered. But this result does not follow. If there is no statute on the subject, interest will be allowed by way of damages for unreasonable withholding payment of an overdue account. The rate must be reasonable, and conform to the custom which obtains in the community in dealings of this character.'

"And the decisions of this court have often since exemplified the principle by considering the question of the responsibility for interest from the point of view of reason and justice even though no express statute existed for compelling this payment. So also as to the nature and character of the obligation to pay taxes. As long ago as *Meredith* v. *United States,* 13 Peters 486, it was decided, the court speaking by Mr. Justice Story (p. 493):

> " 'It appears to us clear upon principle, as well upon the obvious import of the provisions of the various acts of Congress on this subject, that the duties due upon all goods imported constitute a personal debt due to the United States from the importer * * *'

"Again in *United States* v. *Chamberlain,* 219 U. S. 250, the nature and character of an obligation to pay a stamp duty was considered, and the right to collect it by action of debt was passed upon and it was held that the obligation to pay was a debt and

that it could be enforced by suit in the absence of an exclusive remedy created by the statute by which the obligation was imposed. In the course of the opinion, various decisions of this court recognizing the right of the United States to enforce internal revenue duties by suit were referred to and the statute to the same end was cited and its application to the case in hand was pointed out upon grounds which in reason may well be said to cause the statute to be applicable to the case here before us. In addition, in repeated adjudication in this court it has been settled that in a suit to recover taxes which have been illegally assessed interest would be allowed against the official although the real responsibility was on the Government. The concluded doctrine on this subject was thus stated in a recent case after referring to the exemption of the United States from liability for interest (*National Volunteer Home* v. *Parrish*, 229 U. S. 494, 496):

> " 'On the contrary, in suits against collectors to recover moneys illegally exacted as taxes and paid under protest the settled rule is, that interest is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector but directly from the Treasury. *Erskin* v. *Van Arsdale*, 15 Wall. 75; *Redfield* v. *Bartels*, 139 U. S. 694.'
>
> *"The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to contract, no interest without statute; in the United States rule, interest in all cases where equitably due unless forbidden by statute. In one no suit for taxes as a debt without express statutory*

authority, in the other the right to sue for taxes as for a debt in every case where not prohibited by statute.

"From this review it results that the doctrine as to non-liability to pay interest for taxes which have become due which prevails in the state courts is absolutely in conflict with the doctrine applied to the same subject in this court and cannot now be made the rule without repudiating settled principles which have been here applied for many years in various aspects and without in effect disregarding the sanction either expressly or impliedly given by Congress to such rules." (Italics ours.)

The tax under consideration in the *Billings* case was a federal tax, but the reasoning applies equally to suits arising out of a liability for state taxes. The nature of the obligation is determined primarily by the enacting state. A tax intended not to constitute an obligation collectible by action, but to be collected exclusively by the statutory remedy, could not be transformed into a different obligation. The Indiana courts, however, have held that taxes constitute debts collectible by suit, and the Indiana statutes have in terms so provided. The Indiana decisions are entirely in harmony with the federal decisions.

In *United States* v. *Chamberlin*, 219 U. S. 250, an action was brought to recover the amount of a documentary stamp tax, payable under the War Revenue Act of 1898. The only question was whether or not the tax could be collected by action. The court lays down this preliminary proposition (p. 258):

"If the statute creates an obligation to pay the tax, and does not provide an exclusive remedy, the action may be regarded as well brought."

It comments on the common law rule as follows:

> "At common law, customs duties were recoverable by the Crown by an information in debt or exchequer information in the nature of a bill in equity for discovery and account. These informations rested upon the general principle 'that in the given case the common law or the statute creates a debt, charge, or duty in the party personally to pay the duties immediately upon the importation, and that, therefore, the ordinary remedies lie for this, as for any other acknowledged debt due to the crown.'"

The court refers to various preceding cases under other federal tax acts and reaches the following conclusion (p. 262):

> "A tax may or may not be a 'debt' under a particular statute, according to the sense in which the word is found to be used. But whether the Government may recover a personal judgment for a tax depends upon the existence of the duty to pay, for the enforcement of which another remedy has not been made exclusive. Whether an action of debt is maintainable depends not upon the question who is the plaintiff or in what manner the obligation was incurred, but it lies whenever there is due a sum either certain or readily reduced to certainty."

The court found that the act in question imposed a personal obligation (p. 263) and contained nothing to negative its collection by action (pp. 263 and 269). The right of action was therefore sustained.

Taxes of all kinds are held to be debts that may be made the subject of a suit by the Government, irrespective

of whether or not other remedies may exist for their collection.

Billings v. *United States,* 232 U. S. 261, 287;
United States v. *Chamberlin,* 219 U. S. 250, 262;
Dollar Savings Bank v. *United States,* 19 Wall. 227, 237, *et seq.;*
United States v. *Erie Ry.,* 106 U. S. 327;
United States v. *Nashville Ry.,* 249 Fed. 678, 683-4;
United States v. *Grand Rapids Ry. Co.,* 239 Fed. 153;
United States v. *Minn. Threshing Machine Co.,* 229 Fed. 1019, 1020;
United States v. *Mexican R. Co.,* 154 Fed. 519;
United States v. *National Fibre Board Co.,* 133 Fed. 597;
United States v. *Cobb,* 11 Fed. 76, 79;
United States v. *Hathaway,* 3 Mason 324, 325, 326, Fed. Cases No. 15983;
United States v. *Phelps,* 17 Blatch. 312, 315;
United States v. *Pacific R. R.,* 4 Dillon 66, 67-69.

In the case at bar, there was always a duty imposed upon the decedent by the laws of Indiana (the state of his residence) to report for taxation his personal property in that state for the purpose of enabling the taxing officials to value it for taxation purposes, and a duty to pay the taxes levied thereon. These taxes became due and payable on a day certain in each year. The sums due were readily reduced to certainty, had he listed his property. These sums have since been rendered absolutely certain by the acts of the tax officers of Grant County in duly assessing his omitted property and in extending taxes thereon, upon

notice to the defendants and an opportunity for them to be heard. All of the circumstances are here present which evoke the doctrine set forth in the *Chamberlin* case.

There can be no distinction in principle between a tax for which the Federal Government may sue as for an indebtedness, and a tax sought to be recovered by a subdivision of a state. The authority of the court is the same in each. Hence the foregoing federal decisions are applicable to the case at bar.

The federal decisions, since they are in entire accord with the Indiana conception of such obligation, establish that for the purpose of suit the obligation for Indiana personal property taxes is a debt. Certainly there is no public policy hostile to the collection of debts in a jurisdiction other than that in which they arise. Even waiving the definition, the federal cases clearly indicate that there can be no public policy hostile to the collection, in the federal courts, of personal obligations of such a nature as those courts consider to be the nature of tax obligations.

Under the federal conception of the nature of tax liability, therefore, the United States courts should enforce such liability arising under the statutes of a state, even considering the United States courts as courts of a foreign jurisdiction. But the laws of the several states are not foreign to the United States courts. It is elementary that the United States District Court for the Southern District of New York is not a court charged with the administration of the laws of New York alone. It also enforces the laws of the State of Indiana applicable to cases properly before it. The jurisprudence of Indiana is not foreign to the court. The situation differs from that involved in a suit by a citizen of Great Britain, or any other foreign power, who bases his right to sue in a federal court upon a foreign statute. Federal courts do not sit to administer the laws of foreign countries. But they *do* sit to ad-

minister state as well as United States statutes. For that reason the District Court takes judicial notice of the laws of Indiana and should enforce them, even where a New York State court might decline to do so.

In the leading case of *Owings* v. *Hull*, 9 Pet. 607, the federal court, sitting in Maryland, was held required to recognize and enforce the laws of Louisiana. The Supreme Court held (p. 625):

> "We are of opinion, that the circuit court was bound to take judicial notice of the laws of Louisiana. The Circuit Courts of the United States are created by Congress, not for the purpose of administering the local law of a single state alone, but to administer the laws of all the states in the Union, in cases to which they respectively apply. The judicial power conferred on the general government, by the constitution, extends to many cases arising under the laws of the different states. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. *That jurisprudence is then, in no just sense, a foreign jurisprudence, to be proved, in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established;* but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts." (Our italics.)

To the same effect are:

> *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 751;
> *Mills* v. *Green*, 159 U. S. 651, 657;
> *Dennick* v. *Central R. R. Co.*, 103 U. S. 11, 17;
> *Gormley* v. *Bunyan*, 138 U. S. 623, 635.

The laws of Indiana, under which this tax liability arises and by which the county treasurer is authorized to bring suit, are therefore not foreign to this Court and to the court below. The reasons advanced for refusal of *state* courts to recognize and give effect to the laws of a sister state have no application. In the latter courts, the laws of other jurisdictions are mere *facts,* not laws. In the federal courts they are *laws,* with all the incidents of legislative enactment.

Therefore, since obligations accrued under revenue laws are transitory actions of a civil nature such as, in the absence of a public policy to the contrary, are enforced in the courts of foreign jurisdictions, and since the reasons for the exception to the rule for enforcement applicable to criminal and penal statutes are wholly inapplicable to revenue acts, and since there is no public policy of the United States under which the comity of the federal court should be refused, the district court should have assumed jurisdiction of the present cause of action.

Point VII.

Extraterritorial imposition of tax liability must be distinguished from extraterritorial enforcement of such liability. The latter is constitutionally unobjectionable.

The Circuit Court of Appeals, in its prevailing opinion, fell into the error which appears in the *Harbeck* and other cases, of confusing two entirely distinct matters, viz.: the imposition of liability and the enforcement of liability. The opinion treats the question of whether liability, validly incurred, may be enforced in another jurisdiction, as the equivalent of the question whether liability may be imposed extraterritorially. These are both treated as constitutional questions, although the

Constitution does not touch in any way the question of such enforcement.

The prevailing opinion states: "With the appellees and property without the state, and the estate being administered in New York, the effort to collect a tax, for a political sub-division of Indiana, is repugnant to the settled principles of private international law which preclhde one state from acting as a collector of taxes for a sister state and from enforcing its penal and revenue laws as such. The revenue laws of one state have no force in another. The taxing power of a state is, by the federal Constitution (Amendment 14), limited to persons and property within its jurisdiction (Tr. fol. 37)." After citing *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, and commenting on *New York Trust Co.* v. *Island Oil & Transport Corp.*, 11 Fed (2d) 689, and *State of Colorado* v. *Harbeck*, 232 N. Y. 71, the opinion proceeds: "The tax laws of one state cannot be given extraterritorial effect, so as to make collections through the agency of the courts of another state. Indiana's political subdivision, Grant County, is limited in the payment of taxes to property found within its boundaries." (Tr. fol. 38.) After citing several cases which were either penalty cases or cases decided in courts of minor jurisdiction the court says (Tr., fols. 39, 40): "The appellant's argument that the extraterritorial imposition of a tax is to be distinguished from the extraterritorial collection or enforcement of the tax, is without merit. The appellant attempted to impose a tax prior to the commencement of the action. The taxing authorities went through the forms prescribed by the statutes of Indiana, but Breed was dead before the assessment, and the attempt was fruitless. The property was not physically there. Under the due process clause of the United States Constitution (Amendment 14), Indiana has no jurisdiction to impose a tax, because neither

the property nor the deceased was within its jurisdiction at the time the tax was assessed. It may not now use the national District Court outside the state to collect such tax."

These quoted portions of the prevailing opinion proceed partly upon the theory that no tax was imposed and no liability had accrued prior to the death of the decedent. Judge Learned Hand's opinion was to the contrary. The petitioner believes that it is demonstrated in Point V of this brief that the liability accrued and became a personal liability of the decedent during his lifetime and while he was a resident of Grant County, Indiana. If this be true, those portions of the prevailing opinion which are based on the theory that no tax was imposed until after the death of the decedent are without foundation in law.

The prevailing opinion blends and confuses the two questions of extraterritorial imposition and extraterritorial collection of tax liability. These two questions, however, are absolutely separate and distinct. Extraterritorial imposition of tax liability is prohibited by the Constitution. The Constitution is silent as to the collection of tax liability accruing in a sister state.

The revenue laws of one state have no force in another *ex proprio vigore.* No revenue law of Indiana can create a single right or liability, unless there be some person or property subject to the jurisdiction of Indiana upon which the statute can operate. No revenue law can extraterritorially give rise to obligations. This, however, is not a peculiarity of revenue laws. It is equally true of every law, whether statutory or otherwise. On the other hand, it is elementary that *obligations arising from the laws of a state,* whether statutory or otherwise, are enforcible in other states. Enforcement of the liability outside the state in which it arises is a commonplace. When liability has attached by virtue of a statute, such

liability does not evaporate at the border. Otherwise, all citizens would shed all rights at the state line. Extraterritorial enforcement of accrued rights is a matter entirely distinct from the extraterritorial enforcement of statutes, *as such*, by the imposition of obligations outside the jurisdiction. A revenue act is ineffective to impose any obligation upon persons or property not subject to the jurisdiction of the state. But when, as here, the obligation has accrued under the express provisions of the state statute, the enforcement of the obligation outside the territorial limits of the state does not involve extraterritorial operation of the statute. Courts sit to enforce rights, not laws, and although laws have no efficacy to create rights and liabilities beyond the border, rights and liabilities accrued thereunder in the taxing state may follow persons or property across the border, and the enforcement thereof beyond the state jurisdiction involves no extraterritorial efficacy of the statute creating the right or obligation.

Recovery in a foreign jurisdiction, of a judgment for accrued tax liability, would constitute merely the enforcement of a transitory civil cause of action under the ordinary principles of comity, and would involve no extraterritorial enforcement of the statute. Recovery, in a foreign jurisdiction, of a judgment under which defendant's property could be taken, when, by reason of the absence of the person from the taxing jurisdiction, or for whatever reason, no personal liability had theretofore been imposed by law upon the defendant, in the taxing state, would effect the taking of property, and the consequent enforcement of the revenue act by means of the judgment, and would, therefore, constitute enforcement, by means of such judgment, of the revenue laws of another state *as such* and would give such laws extra-

territorial effect, thereby directly contravening the due process clause.

The taxing power is limited to persons and property within the state's jurisdiction. But this means only that the state's power is so limited as to the *imposition* of liability. If liability be imposed within the state's jurisdiction, there arises a transitory civil liability, an obligation to pay the tax, which being no part of the law *as such* is excluded from the operation of the principle which precludes the enforcement of the revenue laws of a sister state *as such*.

The distinction is illustrated in the following cases:

In *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, the action was brought in tort to recover damages for injury resulting in death, the cause of action arising under a Massachusetts statute, the question involved being whether a right of action under that statute might be enforced in the New York courts (p. 102). The court recognized that the courts of no country execute the penal laws of another country, but held that, although the statute had penal features, it was not in substance penal (p. 102, *et seq.*) Judge Cardozo said (p. 106):

> "A tort committed in one state creates a right of action that may be sued upon in another unless public policy forbids. That is the generally accepted rule in the United States (*Huntington* v. *Attrill*, 146 U. S. 657, 670; *Stewart* v. *B. & O. R. Co.*, 168 U. S. 445; *N. Pac. R. R. Co.* v. *Babcock*, 154 U. S. 190; *A. T. & S. F. Ry. Co.* v. *Sowers*, 213 U. S. 55, 67, 68; *Cuba R. R. Co.* v. *Crosby*, 222 U. S. 473, 478, 479; *Howarth* v. *Lombard*, 175 Mass. 570; *Walsh* v. *B. & M. R. R.*, 201 Mass. 527, 530)."

And at page 110, he said:

> "A foreign statute is not law in this state, but it gives rise to an obligation, which, if transitory, 'follows the person and may be enforced wherever the person may be found.' (*Slater* v. *Mex. Natl. R. R. Co.*, 194 U. S. 120, 126; *Lauria* v. *Du Pont De Nemours & Co.*, 241 Fed. Rep. 687; *Cuba R. R. Co.* v. *Crosby*, 222 U. S. 473, 478). 'No law can exist as such except the law of the land; but • • • it is a principle of every civilized law that vested rights shall be protected' (*Beale, Conflict of Laws*, Sec. 51). The plaintiff owns something, and we help him to get it (*Howarth* v. *Lombard*, 175 Mass. 570; *Walsh* v. *B. & M. R. R.*, 201 Mass. 527; *Walsh* v. *N. Y. & N. E. R. R. Co.*, 160 Mass. 571; *Beale, Conflict of Laws*, Secs. 51, 73). We do this unless some sound reason of public policy makes it unwise for us to lend our aid."

In *Howarth* v. *Lombard*, 175 Mass. 570, 572, 56 N. E. 888, it was said:

> "The fundamental question is whether there is a substantial right originating in one state, and a corresponding liability which follows the person against whom it is sought to be enforced into another state. Such a right, arising under the common law, is enforceable everywhere. Such a right, arising under a local statute, will be enforced *ex comitate* in another state unless there is a good reason for refusing to enforce it. It will be enforced, not because of the existence of the statute, but because it is a right which the plaintiff legitimately acquired, and which still belongs to him."

In *Galveston, H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481, two actions against an initial interstate carrier for failure to deliver merchandise were brought in a Texas state court. The Supreme Court said (p. 490):

> "The real question, therefore, presented by this assignment of error, is whether a state court may enforce a right of action arising under an act of Congress.
>
> "Statutes have no extraterritorial operation, and the courts of one government cannot enforce the penal laws of another. At one time there was some question both as to the duty and power to try civil cases arising solely under the statutes of another state. But it is now recognized that the jurisdiction of state courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the state in which the suit is brought. Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the federal and the state government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by federal statute. *Robb* v. *Connolly,* 111 U. S. 624, 637."

Revenue acts have no inherent peculiarity, as distinguished from other statutes, which would make the extra-

territorial enforcement of obligation arising thereunder the equivalent of extraterritorial operation of the statute itself. Therefore, enforcement of the obligation outside the jurisdiction in which the obligation arises is subject to no constitutional objection.

Applying the foregoing principles to the case at bar: the taxes here involved were not original creations springing up in the State of New York during Breed's lifetime or afterwards, by force of Indiana tax legislation. They were Breed's personal obligations incurred each year in Indiana by reason of his residence in Indiana and his ownership of intangible personal property, taxable to him in that state. Being in the nature of personal indebtedness accruing March 1 of each year, they constitute a transitory cause of action, imposed in Indiana but enforcible outside of that state, like any other civil obligation *in personam*.

Point VIII.

The cases cited in the prevailing opinion of the Circuit Court of Appeals are all distinguishable or are mere decisions of courts of minor jurisdiction.

Wisconsin v. *Pelican Insurance Co.*, 127 U. S. 265, (Tr., fols. 37, 39), involved a penalty statute only and, therefore, did not decide the present underlying question. An action of debt was commenced in the Supreme Court of the State of Wisconsin against a corporation of Louisiana, based upon a judgment recovered in a Wisconsin state court for a penalty incurred by the corporation in failing to file certain annual statements required by the Wisconsin statutes. Demurrer to the original jurisdiction of the Supreme Court was filed on the ground that the suit was one for the enforcement of a penalty or forfeiture, was a suit penal in its character and was not a "con-

troversy of a civil nature" within the meaning of these words in Section 687 of the Revised Statutes (p. 269). The holding of the court was that original jurisdiction of the Supreme Court of controversies between a state and a citizen of another state embraced controversies of a civil nature only within the meaning of the section referred to and that a suit to enforce a penalty was not such a controversy, regardless of the form of action provided for the recovery of such penalty in the state court.

New York Trust Company v. *Island Oil & Transport Corporation*, 11 Fed. (2d) 698 (Tr., fol. 37). Since this was a decision of the court which decided this case below, it may be unimportant whether the decision covered the present underlying question. It is submitted, however, that the decision did not cover the question at bar. An annual franchise tax was levied upon a Virginia corporation by the State of Virginia after such corporation had been placed in the hands of receivers appointed by the federal court in New York. After the receivers were appointed, Virginia continued to assess the franchise tax upon the *corporation*, exactly as it had done previously. The receivers asked the instruction of the court appointing them, as to whether or not they should pay the tax *for the year subsequent to their appointment, in priority to the claim of general creditors.*

At no time since the receivership had there been any assets of the company in Virginia. The receivers took the position that as a matter of "comity, equity and expediency" the taxes should be paid, because of the possibility that, if not paid, the company's charter might be revoked by the State of Virginia, which action would embarrass the receivers in the collection and distribution of the corporate assets. The District Court authorized the payment of the tax, and the creditors' committee appealed.

The Circuit Court of Appeals held that the tax might

properly be paid by the receivers, in their discretion. That was the extent to which the order of the District Court went and it was affirmed. Whether or not Virginia could demand the franchise tax as a matter of legal right was not before the court, and therefore could not be authoritatively decided.

The court's discussion of Virginia's legal right to demand the tax, being *dictum*, was based upon the grounds, (1) that no property of the corporation had ever been within the State of Virginia during the year for which the tax was assessed; (2) that the assets of the corporation had all been in the hands of the federal receivers in New York, where they were subject to the claims of general creditors and Virginia had acquired no preferential lien upon them as against unsecured creditors, for they had never been within the state; (3) that having no preferential lien against the assets in the hands of the receivers, Virginia had no authority to lay a tax against the receivers themselves, for they had never operated within that state, or to impose any lien whatever upon assets which had always been in the hands of said receivers in New York; (4) that the license tax imposed by Virginia against the corporation, after the receivers were appointed, did not attach as a matter of law to the foreign receivers.

That these were the grounds upon which the decision rested, and not the broad proposition that taxes of one state can never be enforced in another, is conclusively shown by the citation of *Franklin Trust Co.* v. *New Jersey*, 181 Fed. 769, 104 C. C. A. 629, which, Judge Hough states, covered the matter then before the federal court in New York. In the *Franklin Trust Co.* case, the franchise tax was clearly distinguished from an ordinary tax, and was regarded as "not a tax at all" but an arbitrary, obnoxious and discriminatory imposition upon a corpora-

tion without regard to the value of its property or its franchises, and in the nature of a license fee. The court in the *Franklin Trust Co.* case expressly excluded from consideration cases of ordinary taxes, by saying (p. 769):

> "The proposition as to what might be the status in this jurisdiction of a New Jersey tax levied upon property, under rules which exclude the idea of disproportion and arbitrary imposition, has no bearing whatever upon the question before us."

The cited case, as did the *New York Trust Company* case, involved a claim to a preference over all unsecured creditors of the insolvent corporation, and did not present the question whether the claim, as non-preferential, should be allowed. Particular stress was laid in the *Franklin Trust Co.* opinion (and inferentially in the *New York Trust Company* case) on the fact that the corporation was a mere shell; that it had no assets in the state of its creation during the year for which the franchise tax was levied; that it did no business there; and that foreign creditors, who dealt with it on the faith of its assets in their state, should not be postponed to the license fee assessed by the parent state against an insolvent concern. It was conceded that taxes accrued prior to the receivership might perhaps be proved and enforced in the federal proceedings, the court saying (p. 774): "If they (the license fees) had accrued before the bill now before us was filed, they might stand, perhaps, as a claim to be proved, either secured or unsecured."

That the *New York Trust Company* case was not intended to determine the question now before the court is further shown by its citation of *Holshouser Co.* v. *Copper Co.*, 138 N. C. 248, 50 S. E. 650, and of *Ballou* v. *United States, etc., Co.*, 67 N. J. Eq. 188, 59 Atl. 331. In the former, the question related solely to the right of pref-

erence of a foreign state over local creditors of an insolvent corporation chartered by the foreign state, but whose assets were being administered in the local state; the foreign state claiming priority of payment as to its annually assessed license fee. The court expressed itself as entirely willing to entertain the claim, but not to give it priority over domestic creditors. In the *Ballou* case, there were involved only state license fees which had accrued *after the corporation had been placed in receivership.* No general tax was considered.

State of Iowa v. *Slimmer,* 248 U. S. 115 (Tr. fol. 39), involved no question of taxation. The State of Iowa asked leave to file in the Supreme Court an original bill of complaint against the State of Minnesota and certain individuals to restrain the prosecution in Minnesota of probate proceedings upon the estate of a decedent who was alleged to have been a resident of Iowa. The motion was made with a view to collecting ultimately certain taxes which the State of Iowa alleged it was entitled to have assessed and levied against the property of decedent, but the tax liability was not in issue and the only question involved was whether the State of Iowa could restrain the prosecution of probate proceedings in Minnesota.

Ashley v. *Ryan,* 153 U. S. 436 (Tr. fol. 39), held only that a charge, under the laws of the State of Ohio, upon an interstate consolidated railroad corporation, of a percentage of its entire authorized capital stock, as a fee for filing its Articles of Consolidation in the office of the Secretary of State, is not a tax on interstate commerce and that its enforcement involves no attempt on the part of the state to extend its taxing power beyond the territorial limits. The court said at p. 440:

> "Nor does the determination of the Federal question render it necessary to define the nature of the charge imposed; for, whether this charge be

> viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the Constitution of the United States, or involved the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction."

The above, which was stated only *arguendo* and not applied in the Ryan case, is unquestionable in legal principle, but as it concerns the imposition and not the collection of taxes has no bearing on the present case.

Matter of Anita Bliss, 121 Misc. (N. Y.) 773 (Tr. fol. 39), is a decision of the Surrogate's Court of New York County misconstruing, if the petitioner's theory as to that decision is correct, the decision in the *Harbeck* case, *infra.*

Walker v. *Treasurer,* 221 Mass. 600 (Tr. fol. 39), was an action brought by the administrator with the will annexed of a Massachusetts estate to determine the liability of the estate to the commonwealth for a succession tax in respect of certain property held in trust by a Maryland corporation, and, therefore, outside the jurisdiction. It involved the question of whether a tax could be levied upon property outside the jurisdiction and not the question of whether taxes could be collected by suit outside the jurisdiction.

People v. *Kellogg,* 268 Ill. 489 (Tr. fol. 39), also involved only the question as to whether taxes could be imposed upon property not subject to the jurisdiction. This case held that real estate in Ohio was not subject to an Illinois inheritance tax as it did not descend by virtue of the laws of Illinois.

State of Colorado v. *Harbeck,* 232 N. Y. 71 (Tr. fol. 37, 38), is the case upon which the respondents have insisted most strongly throughout this litigation. The indulgence

of the Court is therefore asked for the following lengthy but necessary discussion of that case.

The Harbeck case was decided on a point of constitutional law.

The Court of Appeals of New York stated the question for decision as follows:

> "The question is whether the inheritance tax of Colorado may, *consistently with the due process clause of the United States Constitution,* be collected extraterritorially, by suit against the beneficiaries." (Italics ours.)

The facts were as follows: The State of Colorado sought to recover a Colorado inheritance tax against defendants, who were distributees of a decedent's estate, the will having been probated in New York. The executrix had been discharged and the estate settled two years prior to the commencement of the action. The inheritance tax had, of course, never been an obligation of the decedent during his lifetime but became operative, if at all, only at his death. The tax was assessed with reference to the transfer of stocks, bonds, etc., which had at all times been deposited and held in New York. No proceedings were taken for the assessment of the tax until after the executrix had accounted and the estate been distributed in New York. The Colorado statute provided that the tax should be a lien upon the property transferred until paid and that all legatees and executors should be liable for such taxes until the same had been paid. Neither the property nor the defendants, however, were within the State of Colorado or subject to the jurisdiction of that state.

The trial court based its decision in favor of the defendants upon the fact that the inheritance tax sought

to be recovered was not a debt and consequently was not founded upon a contract express or implied upon which a suit might be predicated, and upon the further ground that the plaintiff had not alleged and proved that it had a right under the Colorado law to institute the suit (106 Misc. 319).

The Appellate Division of the Supreme Court unanimously reversed the court below and held that the action could be maintained (189 App. Div. 865). *Inter alia,* it was there said (p. 875):

> "There is nothing to prevent a state, a political corporation, from seeking in the courts the relief or redress that any other corporation may demand (*Delafield* v. *State of Illinois,* 2 Hill 159). * * *
>
> "The remedy sought by the plaintiff is not limited to its courts and adequate enforcement can be had in ours (*Howarth* v. *Angle,* 162 N. Y. 179; *Shipman* v. *Treadwell,* 200 *id.* 472).
>
> "Public policy does not prohibit the assumption of jurisdiction by this court and the principle of comity demands it. (*Loucks* v. *Standard Oil Company,* 224 N. Y. 99.) The Inheritance Tax Law of Colorado has precisely the same design as a similar law in this state, and may indeed be said to be identical in its general provisions and scope. It was apparently to avoid the full force of the provisions of our own law that the defendants placed the decedent in the position of a non-resident of this state. As was said in the Loucks case: 'A foreign statute is not a law in this state, but it gives rise to an obligation, which, if transitory, follows the person and may be enforced wherever the person may be found. * * *.' 'No law can exist as such except the law of the land;

> but * * * it is a principle of every civilized law that vested rights shall be protected.' * * * The plaintiff owns something, and we help him to get it. * * * We do this unless some sound reason of public policy makes it unwise for us to lend our aid.'"

This unanimous reversal of the trial court was in accord with the expressed trend of the New York Court of Appeals to extend the rule of comity between the states, as illustrated in the case of *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99. Judge Cardozo there said (p. 113):

> "The fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained. At least, that is so among the states of the Union (*Walsh* v. *N. Y. & N. E. R. R. Co.*, 160 Mass. 571, 573; *Walsh* v. *B. & M. R. R.*, 201 Mass. 527, 533; Beach, Uniform Interstate Enforcement of Vested Rights, 27 Yale Law Journal 656). There is a growing conviction that only exceptional circumstances should lead one of the states to refuse to enforce a right acquired in another. The evidences of this tendency are many."

This principle was stated in an earlier case (*Martyne* v. *American Union Fire Ins. Co.*, 216 N. Y. 183, 194) as follows:

> "The reasons for extending the rule of comity between the States is constantly increasing. It should when practicable be extended, but not curtailed."

In spite of these declarations, the Court of Appeals reversed the Appellate Division, upon the ground that

enforcement of the alleged liability by the action then at bar would contravene the due process clause of the constitution.

The Circuit Court of Appeals cites the *Harbeck* case for the general proposition of non-enforceability of tax obligations accruing under the laws of another state. This, we submit, is an entirely erroneous and unjustifiable interpretation and application of the decision. The entire *Harbeck* opinion is predicated upon the premise that by reason of the absence of the persons and property from Colorado, no tax liability had accrued, and from this premise the conclusion inevitably followed that to allow a recovery would be to enforce, extraterritorially, the tax act as such. The court held that the proper steps to fix liability had not been taken, and that liability could not be fixed in Colorado because of lack of jurisdiction over the persons and property involved. To allow a recovery under such circumstances would be tantamount to an extraterritorial *imposition* of the tax, a result obviously prohibited by the due process clause. A judgment based upon liability validly imposed within the taxing state would involve entirely different legal consequences. Such a judgment would not constitute an extraterritorial imposition of liability, nor the extraterritorial enforcement of the tax act as such, but would be merely the enforcement of a transitory obligation which follows the person. Such enforcement of obligation outside the originating state, which is most common, is constitutionally unobjectionable.

Some of the language of this decision appears, apart from its context, to advance the general proposition of non-enforcibility of tax liability outside the taxing state, even though liability had been imposed within that state. Analyzed with the context, it is clear that such language is directed only to the question of extraterritorial enforce-

ment of a tax act as such, and not to the enforcement of liability accrued thereunder. This conclusion is greatly strengthened by the fact that no single authority cited in the *Harbeck* decision deals with extraterritorial collection, or goes further than to negate the right to *impose* tax liability extraterritorially.

Therefore, as the valid accrual of tax liability in the case at bar is indubitable, the *Harbeck* case is not in point, nor are the principles therein enunciated applicable. Although onerous, it is necessary, for a proper understanding of the *Harbeck* decision to examine its entire line of reasoning. The several points discussed are logically related; each point is considered in the light of the fact stated in the opinion (p. 80) that the property was not present in Colorado and that the defendants were non-residents, and is directed to the constitutional question stated.

The first point made was that, as the statute made no provision for collection by action, no action would lie, even though the statutory method of collection were unavailable; that no substitute for the statutory method of collecting taxes, as such method is expressed or fairly implied, may be invoked *either in the State of Colorado or elsewhere* (p. 81). It may be noted that Judge Crane concurred upon the sole ground that he could find no authority in the Colorado tax law for the action (p. 85). This point does not concern extraterritorial collection except incidentally, the decision being that collection by suit was unavailable even in Colorado. Nor has it any application to the case at bar, since the present action is explicitly directed and authorized by statute. It may be noted, however, that the Indiana decisions uphold the right of action without explicit statutory authorization, in which the federal decisions, contrary to the New York decisions, concur.

Some tax acts contemplate collection by statutory methods only, and not by suit, and many suits brought under such acts have been dismissed. This, however, does not concern a suit explicitly authorized by statute.

The court then held that the suit could not be maintained as an action upon an implied contract, arising from the acceptance of a legacy under the will of a resident of Colorado (p. 81). The argument of the court, summarized, was that taxes are non-contractual in nature, enforcement of revenue laws resting not on consent, but on force and authority; and that "No personal liability *based upon the receipt of a legacy* arises except under the provisions of the Colorado statute (§1) that the person to whom the property is transferred shall be personally liable for the tax until its payment *and that liability is purely local and statutory.*" (Italics ours.) The discussion of this point did not concern enforcement, but the question was whether the receipt by legatees who were beyond and not subject to the jurisdiction of Colorado, of a legacy consisting of property which was in the contemplation of the court outside the jurisdiction of Colorado, created a quasi-contractual obligation. The conclusion was reached that the acceptance by persons outside the State of Colorado of property outside the State of Colorado created no liability under a statute which could impose liability only locally within the State of Colorado. (It may be noted that the federal rule does not accord with the theory stated as to the nature of tax liability. See Point VI. And that the court was in error in holding that the property was outside the jurisdiction, under the decision in *Blodgett* v. *Silberman*, 277 U. S. 1, *infra*, page 70. In the case at bar there is no question of quasi-contractual obligation. Breed's tax liability arose not from any acts performed by him, his executors or legatees, either in the State of Indiana or elsewhere, but by

a direct operation of the Indiana statute upon a resident of that state in respect to property within the jurisdiction.

The court then held that the above-stated implied promise theory was fallacious, for the further reason that Colorado had acquired no control either of the property of the estate or of its owners, the executrix having paid the legacies by virtue of the authority vested in her on the probate of the will by the state of New York without invoking any privilege or sanction conferred upon her by the State of Colorado (p. 82). This point, which also concerns taxability and not collection, has no bearing on the instant case since Indiana had jurisdiction both of Breed and of his property.

The court then held (p. 83):

> "Although a liability to pay the tax exists under the Colorado statute, jurisdiction and power to enforce the liability in the New York tribunal must be established. Under the due process clause of the United States Constitution, where the delinquents are non-residents of the taxing state and outside its jurisdiction, so that no personal liability or enforceable duty may be established as against them and where the property involved is without the taxing state so that no *res* exists upon which the taxing state may impose a lien, the state is powerless to collect the tax in its own courts and powerless to invoke the aid of a sister state to collect its revenue."

Under the circumstances stated, *i. e.*, where by reason of the absence of both person and property from the state neither can be taxed, the state is powerless to collect, either at home or abroad. The helplessness in the matter of remedy results from the inability to tax—the inability to impose personal obligation upon persons absent

from the jurisdiction, or to impose a lien upon property absent therefrom. This point goes to the original establishment of existing liability, and is inapplicable to a case like the present where liability is imposed upon a resident in respect to property within the state. It should also be noted that the authorities cited at this point deal solely with the question of the imposition of liability and not with the question of collection.

The court then held that the rule *mobilia sequuntur personam* did not apply and that the tangible *res* was at all times in New York and not Colorado, and that, therefore, the State of Colorado had no enforceable lien thereon by virtue of the taxing order (p. 83). The application of the rule *mobilia sequuntur personam* is of the utmost importance in the present litigation. If the rule applies in case of an inheritance tax, it certainly applies in the case of a personal property tax. The refusal of the Court of Appeals to apply the rule in the case of an inheritance tax was erroneous. This Court has since, in the case of *Blodgett* v. *Silberman* (*infra*, page 70), upheld a Connecticut inheritance tax act upon a state of facts identical in all material particulars to those presented in the *Harbeck* case, holding that for the purpose of liability under an inheritance tax act the rule should be applied.

The next point made by the court is that the steps provided by the Colorado statute for the fixing of personal liability had not been carried out (p. 84). In the instant case, the Indiana statutes have been complied with in all particulars.

The court then makes its final point. At page 85 it is said:

> "But it is urged that the right of the State of Colorado to maintain an action for the collection of the tax when the special remedy is ineffective,

> is upheld by its local laws (*Pinnacle G. M. Co.* v. *People*, 58 Col. 86); that the Colorado statute provides that the attorney-general may collect the tax in 'any other manner as may be provided in this act or *by law*' (Act of 1916, Sec. 13), *i. e.*, by a common-law action. This contention also is unsound. The attempt to give such a statutory provision extraterritorial effect would conflict with another well-settled principle of private international law which precludes one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The rule is universally recognized that the revenue laws of one state have no force in another. The remedy is a part of the law and we are once more brought to face the doctrine that the taxing power of the state is by the federal Constitution limited to persons and property within its jurisdiction (*Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Marshall* v. *Sherman*, 148 N. Y. *supra*, pp. 24-26; *Louckes* v. *Standard Oil Co.*, *supra*, p. 102; *Walker* v. *Treasurer, etc.*, 221 Mass. 600; *City of New York* v. *McLean*, *supra*.)"

It is from this portion of the Harbeck decision, doubtless, that the Circuit Court of Appeals drew the conclusion that that case upheld the general proposition of non-enforcibility of tax liability outside the taxing state. But throughout the *Harbeck* opinion, the court has discussed the several points on the basis of the invalidity of the alleged liability, or failure to impose liability either on the persons or on the property. Certainly the court does not at this point, without warning and without calling attention thereto, change the entire basis of its discussion and its entire line of reasoning. This point is

predicated on the same facts as the previous points considered.

The principle is stated that one state is precluded from acting as collector of taxes for a sister state and from enforcing the penal and revenue laws *as such*. Although unsupported by citation of authority, we do not question this principle, if properly applied and limited, the limitation being contained in the words "*as such.*" These words limit the application of the principle to the enforcement of these laws *as laws* and exclude from such application the enforcement of consequences of the laws, namely, the duty to pay what the law of the taxing state had already imposed on persons and property subject to the jurisdiction.

Petitioner submits that it is established under Point VII hereof, that the extraterritorial imposition of obligation is a matter entirely distinct from the extraterritorial enforcement of such obligation and that the latter is subject to no constitutional objection.

A correct interpretation of the *Harbeck* decision therefore limits its application to cases where no tax liability had been otherwise validly imposed. If that decision, however, can be said to deny as a general proposition, extraterritorial enforcement of tax liability, even where the liability has been validly imposed, we believe that it is unsound and entirely unsupported by authority. It is above demonstrated that there is no constitutional objection to the maintenance of jurisdiction. The authorities cited deal only with the jurisdiction to impose tax liability on persons or property, and not with the collectability of liability when imposed, and do not in any way support, or even consider, the non-collectability of such liability. The *Harbeck* decision refused jurisdiction on strictly constitutional grounds. The question of comity did not come up for consideration, and there was

no pronouncement that comity would be denied on grounds of public policy. If the constitutional objection fails, the court below should have taken jurisdiction of the instant case, in the absence of a rule of public policy to the contrary. No such rule exists.

Blodgett v. *Silberman*, 227 U. S. 1, in adopting and applying the maxim *mobilia sequuntur personam* overrules the theory upon which the *Harbeck* case declared the inheritance tax invalid and thereby vitiates the conclusions reached in the *Harbeck* case. Since the *Harbeck* decision this Court has, in its decision in *Blodgett* v. *Silberman*, enunciated a theory as to the validity of inheritance taxation directly contrary to the holding in the *Harbeck* decision, thereby not only shattering confidence in the *Harbeck* case as an authority, but also entirely invalidating the conclusions reached. The *Blodgett* case establishes the rule *mobilia sequuntur personam* as applicable to inheritance taxation. The decision in the *Harbeck* case denies any *jurisdictional right* on the part of the domicile state to impose a succession tax with respect to stocks and bonds physically located in another state and repudiates the doctrine of "*mobilia sequuntur personam*," saying:

> "*Mobilia sequuntur personam* is not an exclusive rule of universal application nor does it transfer property into the foreign from the domestic jurisdiction. It is a rule of convenience merely, permitting taxation at the domicile of the owner of personal property which may at the same time be subject to taxation where the property itself is permanently located." (p. 84.)

That this is the ground of the decision is clear from the following:

> "This state taxes the succession of personal property of non-residents according to the actual *situs* of the thing (*Matter of Romaine,* 127 N. Y. 80, 89), and our courts may not say that the assets of the estate are at the same time actually within and without the State of New York. *The tangible res was, therefore, at all times in New York, and not in Colorado.*" (Page 84.) (Italics ours.)

Again, the court held:

> "Colorado had acquired no control either *of the property of the Harbeck estate* or of its owners." (p. 82.) (Italics ours.)

And further:

> "Where the property involved is *without the taxing state* so that *no res exists upon which the taxing state may impose a lien,* the state is powerless to collect the tax in its own courts and powerless to invoke the aid of a sister state to collect its revenues. (p. 83.) (Italics ours.)

If the court in the *Harbeck* case had recognized this principle, there is nothing in the opinion to indicate that access to its courts would have been denied to collect a valid tax.

The following cases are commented on for the reason that they are cited in the opinion of the District Court below, and in the *Harbeck* opinion:

Pennoyer v. *Neff,* 95 U. S. 714, (Tr. fol. 17), does not involve the application of the law of a foreign state. It arose in the Circuit Court of the United States for the District of Oregon. The plaintiff Neff sued the defendant Pennoyer for the recovery of a tract of land situated in

Multnomah County, Oregon, Neff claiming title under a United States patent and Pennoyer claiming title by virtue of a sheriff's sale under execution, sued out upon a judgment against Neff rendered by an Oregon state court. Neff was a non-resident of Oregon and had been served only by publication of the summons. It was held that substituted service by publication of process, instituting actions brought against non-residents, is effectual only where property within the state is brought under the control of the court and subjected to the jurisdiction by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein. The opinion states that since the adoption of the Fourteenth Amendment to the Federal Constitution the validity of the judgments of state courts may be directly questioned and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court had no jurisdiction do not constitute due process of law (p. 733). Except as to the general principle of the inability of a state court to impose liability upon persons outside and not subject to the state jurisdiction, the case is irrelevant to any of the issues in the present litigation.

Parker v. *Moore,* 115 Fed. 799, (Tr. fol. 37), held that the United States courts would follow the rules laid down by the highest court of a state in determining whether the *lex loci contractus* or the *lex fori* should govern, as to the interpretation of the contract and the morality of the claim, in the case of a claim under a contract which was alleged to be a gambling contract but which was enforceable under the laws of the State of New York, the state in which it was made and was to be performed.

Maxwell v. *Bugbee,* 250 U. S. 525, upholds the constitutionality of a New Jersey inheritance tax. The court conceded that consistently with the Federal Constitution a state may not tax property beyond its territorial jurisdiction, but held that the adoption, as a measure of tax, of the proportion which specified local property bears to the entire estate of decedent did not make the tax one upon property without the state (p. 539). It is only this concession that has any bearing on the *Harbeck* case. *Maxwell* v. *Bugbee* does not deal with or consider the question of extraterritorial collection.

Dewey v. *Des Moines,* 173 U. S. 193, holds that no personal liability can be imposed by assessment for local improvements against a non-resident owner of real estate who had received no notice of assessment.

City of New York v. *McLean,* 170 N. Y. 374, holds that the legislature had no power to impose upon a non-resident a personal liability for the payment of a tax assessed upon shares of national bank stock. The court distinguishes between the jurisdiction of the court over the person of the defendant in the action brought to enforce the alleged personal liability and the question whether any personal liability arose by imposition of the tax (p. 383).

Matter of Maltbie v. *Lobsitz Mills Co.,* 223 N. Y. 227, holds that the tax assessed upon the capital of a New Jersey corporation invested in its business in the City of New York imposed upon a foreign corporation no personal liability which could be made the basis of supplementary proceedings when the tax was returned uncollected.

Marshall v. *Sherman,* 148 N. Y. 9, was a stockholder's liability action. Merely as illustrative of laws having no effect in New York, the court said (p. 25), without citation of authority:

> "It has been held, and is a principle universally recognized, that the revenue laws of one country have no force in another."

In respondent's brief, in opposition to petition for writ of certiorari, the following cases were cited:

State of Maryland v. *Turner*, 75 Misc. 9. This was a mere trial term decision of the New York Supreme Court. The court said: "I do not find any case where such an action has been brought, so that the questions here presented are not only most interesting, but absolutely novel."

State of Arkansas v. *Bowen*, 20 D. C. Reports, 291. This was a penalty case.

Henry v. *Sargent*, 13 N. H. 321, 332, contains a dictum supporting respondent's contention, but the case was for false imprisonment and no enforcement of a revenue law was involved. This case was referred to in the Columbia Law Review discussion, *supra*, page 24.

Heine v. *The Levee Commissioners*, 86 U. S. (19 Wall.) 655, concerns no question of extraterritorial collection but merely the question of whether a court of equity would exercise the power to levy and collect taxes.

Rees v. *City of Watertown*, 86 U. S. (19 Wall.) 107, held only that the federal courts sitting in equity did not possess power to appoint a marshal to levy and collect a tax.

As against these decisions, the following may be cited, wherein courts recognized and enforced tax liabilities existing in other states:

Holshouser v. *Copper Co.*, 138 N. C. 248, 50 S. E. 650.

Pratt v. *Dean*, 246 Mass. 300, 306;

Goodrich v. *Rochester Trust Co.*, 173 App. Div. (N. Y.) 577;

Welch v. *Treasurer*, 123 Mass. 87, 91, 97;

That the federal courts will cooperate with the states in the collection of taxes, has been held in

Litchfield v. *County of Webster,* 101 U. S. 773;
Bernardino Co. v. *Southern Pac. R. Co.,* 118 U. S. 417;
In re Tyler, 149 U. S. 164, 186-187;
Dayton, Trustee, v. *Stanard, Treas.,* 241 U. S. 588;
Marshall v. *New York,* 254 U. S. 380;
Ladoux v. *LaBee,* 83 Fed. 761, 764, 766-767;
First National Bank v. *Ewing,* 103 Fed. 168, 186-190;
Midland Co. v. *Douglas County,* 217 Fed. 358 (C. C. A. 8th Cir.);
Coy v. *Title Guarantee Co.,* 220 Fed. 93, 135 C. C. A. 658;
Spencer v. *Babylon R. Co.,* 233 Fed. 803, 804, 807;
Bear River Co. v. *Petoskey,* 241 Fed. 53, 57, (C. C. A. 6th Cir.);
Union Trust Co. v. *Great Eastern Co.,* 248 Fed. 46, 47, 50, (C. C. A. 5th Cir.);
Georgia v. *Atlantic R. R. Co.,* 3 Woods 434.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed.

Richard Edwards Breed resided for a number of years in Grant County, Indiana. He was, during all that time, the owner of a large amount of intangible personal property subject to taxation. In violation of the laws of the State of Indiana, Breed made no return of his said property for taxation. In consequence, he paid no taxes on said property either in the State of Indiana or elsewhere. Nevertheless, under the Indiana statutes, an obligation for personal property taxes accrued against Breed in each year as a personal obligation. The amount of such taxes has been fixed by assessment as provided by the Indiana statutes, but such assessment was not a condition precedent to the accrual of the tax obligation. These taxes have never been paid. Petitioner is specifically authorized by a statute of Indiana to maintain the present action.

The money involved, amounting to almost a million dollars, is of great importance to Grant County and to the municipal subdivisions thereof. It is also of the utmost importance to states and other municipal corporations to be able to collect their revenues. It would be seriously detrimental to the vital interests of the states and other municipal corporations if citizens could escape payment of taxes by the mere expedient of removal from the state, even though they might be fraudulently delinquent in their tax obligations, or if estates of tax delinquents could escape taxation merely by probate in some state other than the state of domicile. If municipal corporations are limited in their effort to enforce tax obligations to such efforts as they may make within the state borders, the power to collect revenues essential to the existence

and proper functioning of the states and their subdivisions will be seriously crippled. They are so limited unless suit may be maintained beyond the territorial limits of the taxing state.

The Circuit Court of Appeals has held that the District Court for the Southern District of New York has no jurisdiction to entertain the present action on the ground that revenue laws, as well as criminal and penal laws, are without force beyond the enacting state. The prevailing opinion makes no distinction between revenue laws and penal statutes and bases its opinion upon citations of decisions under the latter. Judge Learned Hand in his concurring opinion recognizes the distinction but holds the revenue laws fall within the same reasoning as criminal and penal statutes. But revenue laws are utterly different from criminal and penal statutes and do not fall within the same reasoning. A suit for the recovery of tax obligations which have accrued as personal obligations of a resident of a state during the time of his residence are mere suits for money judgments and do not in any way concern provisions for the public order of a state and cannot violate domestic public policy. Actions on such obligations are transitory actions of a civil nature such as, in the absence of a public policy to the contrary, may be enforced wherever the person liable is found. The statutes under which they arose are ordinary personal property tax statutes. The view taken by the federal courts as to the personal nature of tax liability is entirely in harmony with the view taken in the statutes and by the courts of Indiana. There can be no public policy hostile to the jurisdiction. Since the reasons on which is founded the exception that criminal and penal laws will not be enforced in another state do not apply to civil obligations under revenue acts, the exception should not

be extended to revenue acts. The District Court should have assumed jurisdiction of the cause of action.

The judgment of the Circuit Court of Appeals should, therefore, be reversed.

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